driver is suspended. The authorities also show that the facts relied upon as special reasons must, unless admitted, be proved by evidence, and also that the special reasons must be fully and clearly stated by the Court on deciding not to disqualify.

I say it is not necessary for me to detail the references to those decisions because they are quoted and have been acted on in the Federation by the High Court. In the case of *Public Prosecutor v. M. Karthiah*[1], Mr. Justice Spenser Wilkinson held that the English authorities relating to 'special reasons' apply in this country, and I have no reason whatever to differ from that decision. On the other hand, I entirely agree with it. That case concerned driving under the influence of drink, but the reasoning is exactly applicable to this case. It is, therefore, clear that the learned Magistrate ought to have ordered disqualification for at least twelve months and I amend his order by making that order of disqualification now. To that extent the appeal is allowed.

As regards the fine imposed, it is open to the Magistrate to consider the hardship caused by disqualification when he assesses the amount of the fine, and to make it correspondingly lower than it would have been. This appears to me to have been a case where the failure to insure was due to a mistake and negligence rather than to any more culpable frame of mind. In the circumstances, and particularly in view of the further penalty of disqualification, I am not prepared to say that the fines were inadequate. The appeal will be allowed, the convictions are confirmed, but the sentences are amended by adding an order for disqualification from holding or obtaining a driving licence for twelve months from the date of the conviction.

Convictions confirmed.
Appeal allowed.

LIM BENG CHYE v. SALLY LEONG & ORS.

[C. A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S.) and Pretheroe, J.) February 13, 1953]

[Penang — F.M. Civil Appeal No. 35 of 1952]

Will — Construction — Bequest — Intention of the testator — Application of the in terrorem rule.

This case concerns the construction of Clause 13 in the Will of a Chinese testator. The clause reads: "13. I devise and bequeath all my property of whatever nature and wheresoever situate of which I shall die possessed and which shall not be otherwise disposed of (except my property in China) unto my trustees Upon Trust to sell call in and convert the same into money (with power in their discretion to postpone such sale call in and conversion) and after payment thereout of my debts and funeral and testamentary expenses and the legacies hereinbefore directed to be paid to invest the residue of such moneys and to stand possessed of such investments and of all parts of my real and personal estate for the time being unconverted (hereinafter called my residuary estate) Upon Trust to pay out of the income of my residuary estate in the first place and out of the capital thereof if such income be insufficient the sums directed to be paid under clauses 9, 10, 11 and 12 hereof and until my youngest son living at my death shall attain the age of 21 years or if he shall die without having attained the age of 21 years then until such time as he would if living have attained such age Upon Trust as to both the capital and income of my residuary estate to pay and divide the same equally among my said wives Yeoh Ah Hong and Queh Ah Gaik and my sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah and my nephew Lim Joo Huat the son of my elder brother Lim Kiah Sah and any other sons that may hereafter be born to me by my said wives Yeoh Ah Hong and Queh Ah Gaik, Provided that if either of my said wives shall not remain my widow or lead a chaste life or shall die before the period fixed for the division of my residuary estate her share shall go equally to my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives Yeoh Ah Hong and Queh Ah Gaik. And provided that if any of my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah, my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives shall die before the period fixed for the division of my residuary estate leaving male issue his share shall go to such male issue equally if more than one but if he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and lead a chaste life."

Held (Mathew, C.J. and Sir Charles Murray-Aynsley, C.J. (S.); Pretheroe, J. dissenting): the testator's intention is clear. He provided in his will for the maintenance of the members of his family while they remained in the family and, apart from certain provisions for payments to his daughters on their marriage, the estate was to be applied for the benefit of the members of the family. His intention was not to penalise widows who re-married, but to insure that all members of the family should be provided for, so long as they remained within the family. Appeal allowed.

Cases referred to:—

(1) *In re Whiting's Settlement,* (1905) 1 Ch. 96 at 115.
(2) *Marples v. Bainbridge,* 1 Mad. 590 at 592.
(3) *Jones v. Jones,* 1 Q.B.D. 279 at 281.
(4) *Perrin v. Morgan* (1943) A.C. 399; (1943) 1 All E.R. 187.
(5) *Harvey v. Aston* 1 Atk. 361.
(6) *Hodgson v. Ambrose* 99 E.R. 216 at 219.

COURT OF APPEAL.

N. A. Marjoribanks and *M. N. Cumarasami* for the appellant.

T. E. Conaghan for the 1st and the 2nd respondents.

Lim Huck Aik for the 3rd and the 4th respondents.

Cur. Adv. Vult.

Mathew, C.J. : — This case concerns the construction of a portion of clause 13 of a Chinese testator's will. The relevant part reads :—

> ". . . . if he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and lead a chaste life."

The learned trial judge held that as there was no gift over, the condition in partial restraint of marriage was *in terrorem* and void.

The law on this subject is extremely difficult. In *In re Whiting's Settlement*[1], Vaughan Williams, L.J., said :—

> "This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole. We are told that the law on this point has been partially imported into our system of law from the Roman Law, and that this was done through the Ecclesiastical Courts. And then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the Ecclesiastical Courts just as the Ecclesiastical Courts did not adopt in its entirety the Roman Law. And eventually, as a matter of history, we find ourselves face to face with this state of things — the Court of Chancery had to administer rules of law which they did not think very fair or very just, and that they were constantly straining the rules, by which they yet declared that they were bound, in order to escape from them."

There have been a number of authorities quoted to us which tend to support the passage in Theobald on Wills (10th edition) at page 440, which reads :—

> "In the case of personalty . . . . certain conditions subsequent, though good in law, are, in accordance with the rules of the Civil Law, held to be void and in terrorem merely if there is no gift over."

In *Marples v. Bainbridge*[2], Plumer V.C. says :—

> "Where there is a bequest, like the present, of personal property, upon a condition subsequent" — that the legatee continues unmarried — "and no bequest over in breach of the condition, the condition is considered only in terrorem."

But I do not think that the question is thereby disposed of completely and that all conditions subsequent with no bequest over are necessarily void. There may be circumstances to rebut the presumption that the condition is void. The true test to be applied in cases of this kind is, to quote the words of Blackburn, J., in *Jones v. Jones*[3] :—

> "The real question seems to be whether the testator intended to discourage marriage or not."

Was this proviso intended to compel the celibacy of the sons' widows? If it was, then this condition is *in terrorem* and void.

In my view, the testator's intention is clear. He provided in his will for the maintenance of the members of his family while they remained in the family and, apart from certain provisions for payments to his daughters on their marriage, the estate was to be applied for the benefit of the members of the family. His intention was not to penalise widows who re-married, but to insure that all members of the family should be provided for, so long as they remained within the family. The failure of the bequests to the widows and daughters of his sons had the effect of increasing the shares of those members of the family who remained within the family, and a failure of a bequest did not create a partial intestacy.

I do not consider that in this case I am compelled to hold that the testator meant something which he did not, and give effect to the exact contrary of his intention. When his intention, as I see it, was not to condemn widows to celibacy, but to preserve his estate for those members of the family who remained within the family, I would be very loathe to hold that in cases where re-marriage is contrary to custom, the strict application of the *in terrorem* rule must be applied.

As regards the second respondent, the testator intended, in my view, that if any widow of his deceased sons suffered forfeiture, that the issue of such widow should also forfeit on the ground, possibly, that if the mother left the family so also would her female issue. I do not think that the proviso as it is worded can be construed so as to apply only to the widow and not to her issue.

I would allow this appeal with costs, and order that the costs be paid out of the estate, the deposit to be paid to the appellant.

Sir Charles Murray-Aynsley, C.J. (S.) that the facts set out in the head-notes above; and continued : — In the events that have happened it is necessary to determine whether the widow of a son who has re-married and her daughter by the deceased son are entitled to a share of residue. The learned Judge who decided the case at first instance applied English cases and formed the opinion that they were so entitled; he reached this conclusion by the application of the "*in terrorem*" rule. This rule is strange and anomalous. It is quite clear that there is nothing contrary to public policy in a gift that discourages the re-marriage of widows, though in the case of persons other than

widows a general restraint on marriage is contrary to public policy. If the appropriate formula is used, as was done earlier in the clause, by making use of a gift over, then no difficulty arises and the widow who has re-married forfeits her interest. In these circumstances it would appear to be merely a question of ascertaining the meaning of the testator, in looking at the clause as a whole; did the testator intend that a son's widow who re-married should forfeit her interest or not?

The *in terrorem* rule is based on a presumption that he did not. It is not possible to justify the presumption on rational grounds. The Courts fell into difficulties when they had to apply the civil law to gifts of personalty and the common law to gifts of realty. One system of law regarded any restraint on matrimony as contrary to public policy, the other did not. The *in terrorem* rule satisfied neither system of law. Its only explanation is that it is due to the prejudices of lawyers trained in the civil law. I think that the first question is whether it is a mere rule of construction. If it is more than this, if it is a rule of law, then, absurd though it is, I think we are bound to follow it. On the other hand, I think that since *Perrin v. Morgan*[4] we are no longer bound as the result of decided cases to hold that the testator meant something which we are quite certain he did not. I think the case of *Harvey v. Aston*[5], makes it clear that this is a mere rule of construction (Wells, C.J., at p. 377). Among Chinese of old fashioned kind, and among Hindus, the re-marriage of widows is contrary to custom. A Chinese testator would not intend the widow of a son to share the family property after she had re-married into another family. This is perfectly well known to anyone with the slightest acquaintance with Chinese custom. I think, therefore, that we would be wrong, in applying English law in this country, to rely on English cases in order to make a presumption as to the intentions of a testator. The Courts in England were dealing with people whose customs were very different, especially on this particular matter of the re-marriage of widows. Taken by itself the clause is quite clear and unambiguous and I see no reason why it should not be applied.

I would allow the appeal on this point.

I do not think that the interest of the 2nd respondent can be separated from that of the 1st respondent. I consider that the re-marriage of the mother defeats the interest of her daughter.

As regards the remainder of the judgment, the appeal should be dismissed.

Costs of all parties, solicitor and client, out of estate. Deposit to appellant.

Pretheroe, J. : — In this case one Lim Kia Joo (hereinafter referred to as the testator) died on the 19th November, 1936, and left a valid will executed on the 21st August 1936. By that will he directed his executors to convert all his assets into money and to pay out certain legacies. The balance left after payment of the funeral expenses and the legacies was to be invested until testator's youngest son attained the age of twenty-one years or, in the case of the death of such youngest son, until such time as that son would have attained the age of twenty-one years. When the date of distribution arrived the residuary estate was to be divided equally between his two widows, his numerous sons and one nephew. In the event the date of distribution proved to be the 3rd March, 1952.

Clause 13 of the will provided, *inter alia*, that if any of the sons, or the nephew, died before the date of distribution and left male issues the son's (or nephew's) share should go equally to such male issue but :—

> "If he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and lead a chaste life."

Testator's son Lim Beng Sai died on the 22nd December, 1942, leaving a lawful widow and one daughter. The widow married again on the 13th August, 1949. In these circumstances the Administrators of the Estate (with will annexed) approached the Court to ascertain what share, if any, of testator's residuary estate should go to the son's widow and to her daughter.

The learned trial Judge, in the course of a long and carefully considered judgment, decided that the proviso in the above quoted portion of the will was merely *in terrorem* and consequently that the widow and her daughter should each take one half of the share which would have accrued to the deceased's son had he survived the date of distribution.

Thereupon the 1st defendant, who had been duly appointed to represent all the beneficiaries having an interest in testator's residuary estate, other than the widow and her daughter, appealed to this Court.

Now the first rule of construction in the case of a will is to give effect to the intention of the testator at the time he made the will. As long ago as 1780 Buller, J., said "There is no rule better established than that intention of a testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend." *Hodgson v. Ambrose*[1]. Although his judgment is

silent on the point, the learned trial Judge doubtless decided that he was unable to ascertain the intention of the testator from the wording of the will. With great respect I am of the opinion that the will does disclose testator's intention at the time he made it. Clause 9 of the will directs the trustees appointed therein to pay each of his two wives $100 a month from the date of testator's death but provided that such payments "shall cease to be payable . . . . if she (sic) shall not remain my widow." Clause 12 gives the two widows of testator (and others) the right to live in the family house free of all expenses. Again the direction is added "the right of either" (of my wives) "to reside in the said house shall be forfeited if she shall not remain my widow." Clause 13 directs that the two widows, several sons and a nephew shall share the residue equally but again the provision is inserted that if either widow does not remain as such "her share shall be forfeited." Finally, in the events which happened, a daughter-in-law was to take a fractional share of the residue but this again is conditional on the fact that she remained the widow of the deceased's son. In short, testator's own widows and the widows of any of his sons forfeited every right under the will if they re-married. These provisions make it reasonably clear I think that testator did not expect, and did not desire, either his own or his son's widows to re-marry. In other words, they had joined his family and he desired them to remain members of the family.

Now the position regarding the testator's daughters is quite different: he expected them to get married. This is reasonably clear because, although each daughter would sacrifice a monthly allowance of $10 on her marriage (clause 11), each was to receive $5,000 on her marriage (clause 7(d)) and also a further sum of $2,000 as marriage expenses (clause 8). Thus, though the re-marriage of widows in the family is discouraged to the utmost degree in testator's power, the marriage of his daughters is encouraged by the offer of considerable financial assistance.

Now the provision in this will which the Court is asked to construe, and which I have quoted earlier in this judgment, concerns the gift to the widow of one of the testator's sons. As in the case of other widows in the family the gift to her of a fractional part of the residue of his estate is made conditional on the fact that "such lawful widow shall remain the widow of such deceased son." Surely he is here giving effect to his view on the re-marriage of widows. I do not for one moment consider that testator intended the condition to be a "mere empty threat"; I think he meant exactly what he said.

I admit that the construction adopted by the learned trial Judge receives support from the fact that there was no devise over in this part of the clause and that there were such devises in all the other cases of forfeiture on re-marriage. But in this instance there was no necessity for any devise over. The widow was to receive a fractional part of the residue, which the trustees had been directed to convert into cash, and not a specified sum as a legacy. So that, if the widow forfeited her right before the date of distribution, it merely resulted in the other beneficiaries getting a larger share of the residue. There was no partial intestacy and consequently no necessity for a gift over.

For the above reasons therefore I am of opinion that the widow (1st respondent) has forfeited her right to share in the distribution of the residuary estate by her re-marriage before the date of distribution.

I now pass to consider the position of the daughter of this widow (2nd respondent). I have already drawn attention to the vastly different treatment meted out by the will to the widows in testator's family on re-marriage as compared with that accorded to his daughters on their marriages. In my opinion testator would regard his grand-daughters (for the purposes of their marriages) in the same light as his own daughters though he did not provide any financial assistance to them on marriage. This is supported by the fact that the forfeiture provision in clause 13 of the will is directed at the widow but not at her daughter. There is no reason why the daughter should lose her right merely because her mother has forfeited her own right. Each derives her right from the same source — the testator's deceased son — but otherwise the gifts are distinct and separate. In my opinion therefore the daughter (2nd respondent) is entitled to receive one half of the share her father would have received if he had survived the date of distribution.

With regard to the third ground of appeal (the destination of the surplus income) I am in complete agreement with the learned trial Judge.

I would therefore allow this appeal as against 1st respondent but would dismiss it as against 2nd respondent. I would hear counsel as to costs.

Appeal allowed.

SI TOH FOK TIAK trading as CHOP WING LOONG v. CHOP SWEE KEE & CO.

[A. C. J. (Abbott, J.) February 20, 1953]

[Malacca — Civil Appeal No. 3 of 1952]

Evidence — Leave to adduce fresh evidence — Principle on which leave refused.

The principle on which leave to adduce fresh evidence must be refused is where, at the trial, it could have been produced with the exercise of proper diligence. In this case the application to adduce fresh evidence is granted. Fresh trial ordered.

APPLICATION.

C. S. Jayaswal for the appellant.

W. H. Sault for the respondents.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Abbott, J. : — This is an application, preliminary to the argument of the appeal, for leave to adduce fresh evidence.

The plaintiff (the appellant) sued the defendant firm (the respondents) for a sum of money alleged to be due in respect of sewing machines. It was the case for the defendant firm that the sewing machines had been sold to one Hong Boon Pin, who was the manager of the defendant firm, in his personal capacity — that the transaction was not part of the defendant firm's business. Hong Boon Pin gave evidence for the defence and said that the defendant firm was not a party to the sale. The President of the Sessions Court in Malacca accepted the defence and gave judgment against the plaintiff.

The application for leave to adduce fresh evidence, one witness, is supported by affidavit — "It was never anticipated that the evidence of Ismail Hassan could be forthcoming in the lower court". There is an affidavit sworn by Ismail Hassan which, if true, shows that, at the material time he, as a customer of the defendant firm, bought a sewing machine and was given a receipt on a paper bearing the defendant firm's name and address in print upon it and also bearing the defendant firm's name on a rubber stamp. This, if true, might well seem to show that the defendant firm was dealing with this sewing machine in the ordinary course of its business.

The principle upon which leave to adduce fresh evidence must be refused is where, at the trial, it could have been produced with the exercise of proper diligence. (*Annual Practice*, 1952, page 1252). In this case, it is quite clear that the existence of such evidence was unknown otherwise it certainly would have been called. It would certainly have required something more than proper diligence to have discovered it. I hold that the application must succeed.

The next question is how best the matter should proceed from here. I do not consider that the case is one which could best be determined in this Court either upon affidavits or upon oral evidence. There was an attack upon the credibility of witnesses whose evidence has already been heard. To determine the case here would be to try the case piecemeal. The proper course is to order a fresh trial and this I do. At the same time I order that the costs of the whole case up to and including to-day shall be awarded to the successful party in the fresh proceedings.

Fresh trial ordered.

PUBLIC PROSECUTOR v. NGOW KENG JEE.

[A. Cr. J. (Abbott, J.) December 3, 1952]

[Malacca — Criminal Appeal No. 20 of 1952]

Emergency (Registration Areas) Regulations, 1948, regs. 11 and 18(2) — Identity Card — Erasure of entry made by person without authority.

This case disposes of the question whether a holder of an identity card who had erased an entry on it which had been entered by a person without authority to enter it, can be guilty of an offence under regulation 18(2) of the Emergency (Registration Areas) Regulations 1948.

Held: under regulation 11 no person may make any erasure in an identity card except a Registration Officer or his duly appointed agent, and it therefore makes no difference whether the entry which had been erased was made by a person with or without authority.

CRIMINAL APPEAL.

D. C. Jackson (D.P.P.) for the Public Prosecutor.

C. S. Jayaswal for the respondent.

Abbott, J. : — The respondent was charged with knowingly having in his possession an identity card containing an unauthorised erasure contrary to regulation 18(2) of the Emergency (Registration Areas) Regulations, 1948. This Court has seen the identity card and it is quite clear that a certain area of it had been roughly rubbed out. There was evidence in the lower court that the entry that was erased was an entry made by the then Chief Police Officer to the effect that the respondent had been a detainee. The learned President acquitted the respondent because he held, and rightly held, that the entry which had been made upon the identity card was made wrongly and without lawful authority. It is not necessary, for the purposes of this judgment, to go into that. But the learned President held that since the entry had been made by a person without authority to make